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AUTHOR	Casey, Dayle A.
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ABSTRACT

This unit focuses on the development of national sovereignty in the United States, the nature of American citizenship, the psychological roots of allegiance, and the relationship of all of these to Constitutional change. The student is asked at the outset to explain the meaning of Pledge of Allegiance to the Flag. Successive sections then explore the meaning and complexity of the phrases: 1) "one Nation . . . , indivisible," --through a study of the gradual supplanting of state by national sovereignty in the ante-bellum period, culminating in the Fourteenth Amendment; and, 2) "with liberty and justice for all" --through a study of the application of that Amendment from its adoption to the present, with particular reference to its civil rights provisions, and meaning for Negro Americans. Finally, the merits of national sovereignty in the Twentieth Century are considered as compared to the merits of states' rights, the nationalism of the Black Muslims, and internationalism. In regard to all of these areas, it is important for the student to realize that the questions involving sovereignty change from period to period. The students should discover the causes for this change. (See SO 000 161 for a listing of related documents.) (SBE)

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Teacher's Manual

ALLEGIANCE IN AMERICA: AN INQUIRY INTO THE IMPLICATIONS OF SOVEREIGNTY AND CITIZENSHIP

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St. Mark's School of Texas
Dallas, Texas

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SO 000 162

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The units have been used experimentally in selected schools throughout the country, in a wide range of teaching/learning situations. The results of those experiments will be incorporated in the Final Report of the Project on Cooperative Research grant H-168, which will be distributed through ERIC.

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This unit was initially prepared in the summer of 1966.

This unit focuses on the development of national sovereignty in the United States. Assuming that most students consider themselves citizens of the nation rather than of a state and that they look to the government of the United States as sovereign, the unit asks them to examine the historical origins as well as the intrinsic merits of their loyalty.

The structure of the unit is simple. Section I makes it clear that following the Revolution the states, not the central government, were sovereign. It then presents documents explaining how the constitutional compromise begged the question by dividing sovereignty between the two jurisdictions. In Section II the student discovers something of the tension between the growing feelings of nationalism on the one hand, and on the other the claims of state sovereignty, which culminate in secession in 1860. Sections III and IV reveal the inception and the fulfillment of national sovereignty. In the former, the student confronts the situation of the freedman and investigates the adoption of national citizenship and sovereignty in the Fourteenth Amendment; in the latter, he observes national sovereignty at work in the interpretation and reinterpretation of the Fourteenth Amendment's civil rights provisions. Finally, Section V opens for consideration the question of the merits of national sovereignty in the twentieth century as compared to the merits of state rights, the nationalism of the Black Muslims, and internationalism.

Although the focus is on sovereignty, a study of the unit involves a number of other broad issues. For example, it is hardly possible to discuss sovereignty in any period of American history without also examining the nature of a federal system of government. Likewise, throughout the materials of the unit, problems of the nature of American citizenship continually arise. In regard to all of these areas, it is important for the student to realize that the questions involving sovereignty change from period to period. The students should discover the causes for this change. They might be asked, for instance: In what ways des the nullification crisis of 1860 differ from that of 1832? Are there ideas or elements of power present in the latter crisis which were absent in the former? The purposes of these are best served, therefore, if the student is led to ask a twofold question with regard to each generation of Americans: In the life of these Americans, who, or what, is sovereign? Why?

INTRODUCTION

The introduction to the unit engages the student in two ways: (1) it reminds the student that every political community has a sovereign power and (2) it reproduces a well-known oath of loyalty to the United States sovereignty, the pledge of allegiance. Perhaps a good opening assignment would be to have the students write a short essay explaining the meaning of the pledge. Most students will probably think that the meaning is obvious and that the job is easy, but the pledge might then be discussed in class in an attempt to get at its implications. Discussion should lead students to see that their loyalty is not being pledged simply to the United States as sovereign, but to a *particular* kind of sovereign -- to "one Nation. . . , individisible, with liberty and justice for all." The unit is designed from this point on to lead the student to discover the full historical significance of this particular sovereign power and of his pledge of allegiance to it. The student might well be asked it the pledge is made to the United States, right or wrong, or if it is being made to the United States on the condition that it is "one Nation. . . , indivisible, with liberty and justice for all."

SECTION I

THE FRAMING OF THE CONSTITUTION

Section I allows the student to see that the sovereign in America was not always the one described by the pledge of allegiance, and it provides materials for a study of the origins of sovereignty in the United States. The first document, the Delcaration of Independence, fixes sovereignty in "the people" by asserting their unalienable right to overthrow unjust governments, an idea which will be picked up again at the end of the unit. Documents 2 and 3 then disclose that after the Revolution sovereignty actually lay with the states. The articles of Confederation and Hamilton's speech in the Constitutional Convention are evidence of the need for a stronger central government -- Hamilton even argues for complete national sovereignty, and Robert Yates' letter is representative of the feelings of the many who are determined to maintain as much power for the states as possible.

Documents 5 and 6 -- portions of the Constitution and the 39th *Federalist* -- make a good assignment by themselves. Taken together, they acquaint the student with the fact that, in the Constitution, the problem of sovereignty was ducked, a compromise was adopted in which sovereignty was split between the states and the new national government. At this point those who are really thinking should begin to sense trouble ahead. A discussion about whether it is possible to divide sovereignty, would be valuable in that it might very well lead some students to anticipate the nullification controversies found in the next section. They might also be asked to consider whether the United States under the Constitution is any more sovereign than it was under the Articles of Confederation. In other words, what parts of the Constitution suggest national sovereignty and what parts state sovereignty? The student should also be aware, in any event, that compromise was probably inevitable, given the conflict between the necessity of a stronger national government and the affections of most Americans for their states and for their local affairs.

SECTION II

ONE NATION, INDIVISIBLE?

Section II is divided into two parts, falling naturally into two assignments. In this section the reader should begin to discover something of the nature of the early American Union. Part A presents documents which introduce the idea of nationalism largely through expressions of attachment to the people and country of America as a whole. The Kohn selection pins down the idea that nationalism depends upon a people with common interests and a common heritage. In relating Kohn to American nationalism, the student should be asked to consider whether the colonial experience and the Revolution bound all Americans together in a common cause to the extent that they then contituted one nation, or whether the diversity of their interests was so great that nationalism and national sovereignty were impossible.

Although South Carolina's declaration claimed that state citizenship, rather then national citizenship is primary, documents 3-8 make it clear that many Americans had developed considerable affection for the nation as a whole. The students ought to be made aware of the importance of nationalism as a dynamic force. Perhaps the class should be reminded that many developments in America during the early nineteenth century, internal improvements and a war with England just to mention a couple, contributed to a growing affinity to the nation on the part of many Americans lessening their sense of identification with particular states.

Calhoun's Fort Hill Address is most significant, for in it Calhoun explained what a large number of Americans felt was the essential genius of the American Union, namely, that power was divided, that the remarkable Constitution granted power to the national government to do those things which it could do well but reserved to the states the power to do the things which they do well. The important thing to see, of course, is that to these Americans nationalism did not require national sovereignty; it required instead an allegiance to a union of states under a constitution which parceled sovereignty out to two levels of government. If one remembers that early in his career Calhoun had been a strong nationalist, his address then becomes all the more important. Given this information, the student might be led to ask whether Calhoun was not still a nationalist in 1831 in that he hoped to preserve the union by insisting that the constitutional rights of the states, as members of the Union, be respected.

Part B reveals the constitutional inadequacies of such nationalism as was developing, by raising the ultimate question of sovereignty: In a conflict of power, who makes the final decision? The Kentucky Resolution, the Hartford Convention Resolutions, and South Carolina's two ordinances all argue, in essence, that the tenth amendment allows the states to make the decision; Jackson's proclamation represents those who feel that the supreme law of the land clause places the power to make the final decision in the national government.

The sharp student will soon discover, however, that the nullification crises are not simply arguments over the meaning of particular clauses of the Constitution, however essential those clauses might be to the-argument. The crises really boil down to an examination of the nature of the American Union. Was it, as the nullifiers claimed, simply a confederation; or was it, as Jackson maintained, an organic whole? Was the United States a league or a nation? What facts of American life in the 1830's supported each view? Those who want to discover the subtlety of the situation will also remember that Jackson was a political descendant of Jefferson and might begin to ask if the Jackson of the "Proclamation" was really so far from the Jefferson of the Kentucky Resolution after all. Were not both man nationalists who were simply emphasizing different parts of the Constitution, Jefferson arguing that the tenth amendment allows the states to decide what laws of Congress were constitutional and Jackson contending that the "supreme law of the land' clause placed the decision with the national governmnet? Jackson had his state rights side, but as President he was obligated to uphold national laws. If the student is reminded of Jackson's early political attachment to the states, he may understand Jackson's dilemma. In attempting to preserve the Union and to satisfy the growing nationalism of the country, how fastcould he move toward a position of national sovereignty without violating the state rights principles of his political constituency?

In any event, the section should make clear that there was no clear constitutional way to decide between the supreme law of the land clause and the tenth amendment. Hopefully, many students will also see that if Americans of that day were asked to make a pledge of allegiance it would have to be considerably different from the one used in schools today. It would have to be a pledge to both the United States and to a state, each sovereign in its own proper constitutional sphere.

SECTION III

THE FRAMING OF THE NEW CONSTITUTION

Section III is complex, but dividing it artificially into parts would have a tendency to give away the main points in the section. Following is one approach.

Documents 1-4 might be studied as a unit. After seeing in the Dred Scott case that Negroes could not be citizens of the United States, the student immediately discovers, however, that even if the Civil War was basically a war for Union, the result of the war was to free the slaves. The question then arises naturally: If Negroes were no longer slaves, what were they? If they had no constitutional sovereign before the war, to whom were they to look as sovereign after the war? If, in Sections II and III, the student began to get a glimpse of the meaning of the phrase "one Nation . . . , indivisible," in Section III he begins to understand the meaning of "with liberty and justice for all."

The rest of the section should probably be read as a whole. In documents 5-7 (Civil Rights Act, Louisiana "black code," veto of the Civil Rights Act), one can see the tension between those who wanted to make Negroes citizens whose rights are protected by the national government and those who oppose national power in civil rights, arguing that, despite the Civil War, the states were still sovereign as far as the rights of individuals were concerned.

Here the perceptive student will begin to sense the relationship between sovereignty and power. If constitutional confusion is to be avoided, can the will of those who hold power be flouted? Selections 8-15 indicate that the victorious Radicals did not think so, that they were determined to establish national sovereignty unambiguously in the field of civil rights even if it meant demanding that the Southern states ratify a constitutional amendment. No citizen, including the freed slave, could be asked to give his allegiance to national sovereignty if the nation did not care to protect him and his rights. Censequently, Thaddeus Stevens and Joahn A. Bingham made much of the fact that the North had won a war and that it was not prepared to enforce its will.

The final document, Article V of the Constitution, when read in light of the struggle over the Fourteenth Amendment, accentuates the point that constitutional questions can become a moot point when power is involved. Could the initial refusal of the defeated states to ratify the amendment (#12) be allowed to stand without thwarting the will of the nation, and without ignoring the causes of the Civil War? "One Nation . . . , indivisible" is now a clearly understandable phrase with concrete historical significance.

In reading the Fourteenth Amendment itself, the student should be aware that it was the constitutional counterpart of the Civil Rights Act and that it was intended to make national citizenship primary and state citizenship derivative from it. It overruled, in effect, President Johnson's veto of the Civil Rights Act by placing civil rights under the jurisdiction of a sovereignty national government. At this point, the student might be asked to reread Article V of the Constitution (I, 6). This article should provide the basis for a discussion as to the legality of the Fourteenth Amendment, a question still argued by some southerners.

SECTION IV

" . . . WITH LIBERTY AND JUSTICE FOR ALL"

Section IV reveals that there is more to be said about "with liberty and justice for all." This section shows that sovereignty is measured by its effectiveness. Following through with the example of civil rights, it becomes evident through a reading of these documents that national sovereignty has meaning only to the extent that it actually affects the citizen and that the citizen's attachment to national sovereignty will vary according to the way in which that sovereignty affects him. As long as basic decisions about the rights of citizens are left to the states, can Negroes, or any other citizen for that matter, be expected to look to the national government as the effective sovereign power in the area of civil rights? The student who is awake will note in the cases that follow that even when the Supreme Court allows the states to make decisions about civil rights, it is the national government, not the states, that is deciding where the power shall lie. But he may also realize that the Negro, like any other citizen, can be expected to make a pledge if allegiance to the national government as his sovereign only when the national goverment begins effectively to enforce the relevant provisions of its Constitution, namely the civil rights purposes of the Fourteenth Amendment. In other words, the student should discover here that the pledge of allegiance is a qualified oath of loyalty, an oath made only to a nation which is willing to give substance to the phrase "with liberty and justice for all." Justice Waite's remarks on citizenship in the first selection make very clear the mutual obligations involved, that of a citizen's allegiance to a states and the state's willingness and ability to protect his rights. Do Justice Waite's remarks throw any light on the meaning of the pledge of allegiance?

Two assignments can be based on Section IV. Documents 2-6 are representative of the Supreme Court's early interpretations of the Fourteenth Amendment, interpretations which left civil rights effectively in the hands of the states and which cast serious doubt upon the truth of "with liberty and justice for all." The student should comprehend that the Slaughterhouse Cases had the effect of returning civil rights to the jurisdiction of the states through semantic trickery, by deciding that in the first two sentences of the amendment the framers did not intend for civil rights to be included in the rights of individuals in their capacity as citizens of the United States but only in their capacity as citizens of a state. In the Civil Rights Cases of 1883, the Court said that even if the Fourteenth Amendment did intend to place the protection of civil rights with the national government, it was not intended to protect individuals from discrimination by other individuals but only from overt action by the state governments. In Plessy v. Ferguson the Court held that even the state governments could discriminate in state laws on the basis of race as long as the laws provided for "equal" treatment. The dissents of Justice Bradley and Harlan in the Slaughterhouse Cases and the Plessy case, respectively, are included to show that the majority opinions were not unanimous. Both dissents also anticipate decisions in civil rights made by later courts, decisions to be studied in the second half of the section.

In the remaining portion of Section IV, the national government begins to take a different tack in civil rights. The Brown decision (#8) overrules the "separate but equal" doctrine of Plessy v. Ferguson, vindicating Justice Harlan; and, in documents 8-11, Congress and the Court interpret the concept of "state action" more broadly than was done in the Civil Rights Cases of 1883. Whereas in these earlier cases the Fourteenth Amendment was taken to mean that the individual was protected only from overt action by the states (that is, from specific state laws), in later cases "state action" is construed to mean that the state may not protect discrimination even if the discrimination is being made by individuals in their "private" businesses. This means, for example, that a state may not protect discriminatory actions by individuals through the functions of their courts or their police, and Justice Douglas even contends that state licensing of a restaurant provides sufficient "state action" for prohibiting discrimination in that business under the Fourteenth Amendment.

If the Court's earlier interpretation of the Fourteenth Amendment did not provide liberty and justice for the Negro, since it left him at the mercy of the states, does this later interpretation provide liberty and justice for the businessman, since it denies him the freedom to run a segregated business? What are the implications of this interpretation for private property? If the "rights" of private property and the civil rights of Negroes come into conflict, which takes precedence? If there is a conflict, and if the conflict is not capable of being resolved, what does the conflict imply about that portion of the pledge of allegiance which reads "with liberty and justice for all?" And what also might its implications be regarding allegiance in America? In winning the Negro to an allegiance to national sovereignty, is the nation running the risk of losing the allegiance of the segregationist? And would not the segregationist withhold his allegiance for the same reason that the Negro might -- namely, that the nation was not providing "liberty and justice for all?" If so, what does this imply about the nature of liberty and justice?

The main thing to see historically is that the national government is now reasserting its power in the area of civil rights, that it is removing them from the jurisdiction of the states and placing them actively in the national sphere. In addition, the Brown decision is significant because it makes a point of arguing that, when the rights of citizens are concerned, it is just as important to consider sociological changes in national life as it is to consider the language and original purpose of the Constitution. In other words, the Court is working on the assumption that the rights of living human beings are more important than the meaning of dead language. Two selections in Section V, statements by Barry Goldwater and James J. Kilpatrick, will question this assumption and will perhaps lead to a discussion of its merits. Ideally, the student will consider whether liberty and justice are absolutes, best protected by an unchanging constitution, or whether they are themselves changing and, therefore, best protected by a constitution capable of liberal interpretation. The fundamental question raised by critics of the Court can be stated: Is the supreme law of the land the Constitution, its language and it original meaning; or is it the Court's interpretation of the Constitution, which may, in thelight of modern developments, differ from the intent of the framers of the Constitution?

SECTION V

THE CITIZEN AND THE NATION IN THE TWENTIETH CENTURY

If Section IV leads some students to believe that national sovereignty is a "good thing," that national power is now being used for "good" ends, Section V might serve to raise some doubt. This section is comprised of a series of recent statements about the role of the nation, and particularly the national government, in American life. They are included to raise questions of value as well as of fact.

Harry Jaffa argues that modern developments have made the United States a nation in fact and that in all national affairs, education now being one area, it must act as a nation. But Barry Goldwater contends that since there is no constitutional provision for national action in the field of education, it remains to this day a local affair under the jurisdiction of the states. The class will want to consider the significance of these articles and should recognize that they raise a question similar to the one raised earlier by the Brown decision: Is the Constitution a legal straitjacket through which the United States is bound to conduct its affairs according to the intentions of men who lived in the eighteenth century? Or, on the other hand, if history has caused an issue, such as education, to develop national importance, should not the government of the nation be able to cope with it? If education is no longer a privilege of the few but a right of all citizens, if it is no longer a relatively insignificant local matter but a vital concern for the entire nation, should the original purpose of the eighteenth century framers of the Constitution be the law of the twentieth century? Or, should the nation be able to exercise its sovereignty in a manner both flexible and imaginative?

Justice Douglas (#3) exhorts the nation to face up to the problem of national citizenship by destroying second-class citizenship and by making "liberty and justice for all" a reality. Elijah Muhammad (#4) answers that the American nation is incapable of giving justice to the black man and pleads, consequently, for a separate black nation. Does this mean that for the Negro the pledge of allegiance is a hoax? In light of American history, is it possible for the Negroes of America to secede? Is there a conflict between Muhammad's conception of justice and "one Nation . . . , indivisible?" If national sovereignty is incapable of providing "liberty and justice for all," what does this imply about human nature in general and about white Americans in particular?

James J. Kilpatrick (#5) warns that the liberties of Americans are being endangered by the trend toward stronger national government, harking back to Calhoun in honoring the wisdom of the Founding Fathers, who had the foresight to establish a "tightly limited central government." Robert M. Hutchins (#6) agrees that liberty and justice are endangered by strong national government but suggests that they might best be preserved by replacing the sovereignty of the nation with the sovereignty of a world government. What are the implications of these articles for the problem of sovereignty? Does not Hutchins, and Elijah Muhammad as well for that matter, lead us right back to the Declaration of Independence? Are not both of these men suggesting that sovereignty lies with "the people" and that when a particular government becomes unjust the people ought to exchange it for another? But are they not also going beyond the Declaration of Independence in suggesting that "the people" may not refer simply to the inhabitants of one country? Could the phrase also mean "the black people" or "the people of the earth?" Perhaps the student might be asked if the modern world is not now in the process of trying to decide who "the people" are. If "the people" means "the people of the earth," what does this imply for national sovereignty in general: If "the people" means "the black people" or the"white people", what does this mean for national sovereingty in America?

Perhaps by now the student will have discovered that sovereignty is more than a political work requiring a definition, that it is a power and a will which must be made manifest through some concrete government dedicated to some particular values to which people can pledge allegiance.

Since the effect of the unit is to have the student re-examine his allegiance, one way to find out how much he has learned is to have him rewrite his original essay explaining the meaning of the pledge of allegiance. Hopefully, the essays will not be identical.

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Student's Manual

ALLEGIANCE IN AMERICA: AN INQUIRY INTO THE IMPLICATIONS OF SOVEREIGNTY AND CITIZENSHIP

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St. Mark's School of Texas
Dallas, Texas

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INTRODUCTION

Throughout history men have identified themselves with some political community. For some, such as the ancient Greeks, this identification has been with a city; for others, especially in modern Europe, it has been with an entire nation. But regardless of the size or type of community, the purpose of its existence is much the same--it is that political body to which the citizens of the community look as the ultimate, or sovereign, power. In becoming a member of his particular political community, a person gives up some of his liberties as an individual, granting to the government of his nation--or city, or tribe--the sovereign power to act on issues which affect the interests of the community as a whole. It is to this sovereign power that the citizen looks for ultimate decisions on the affairs of the entire community.

Every society has such a sovereign power, for without this sovereign power, there could be no society. Without a sovereign power to make ultimate decisions about the problems of the nation, each individual would be free in the long run to pursue his own particular path without regard for the community, and the result would be anarchy.

Who, or what, is sovereign to Americans? The purpose of this unit is to search for answers to this question. In this task there is perhaps no better place to start than with the answer given every day by virtually every student in American schools:

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

SECTION I

THE FRAMING OF THE CONSTITUTION

If Americans in the 1960's can make the pledge of allegiance to the United States, Americans two hundredyears earlier could not. Their oath of loyalty was pledged to George III. Then, between 1775 and 1783, a successful revolution severed American obligations to the British sovereign. The question naturally following is, once Americans no longer looked to the British government as sovereign, to whom did they look as the ultimate power? Try to keep this question in mind as you read the documents in Section I.

1. From the Declaration of Independence, 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

2. In 1778 South Carolina adopted a state constitution, part of

which follows:[1]

> I. That the style of this country be hereafter the State of South Carolina....
>
> XXX. That all the officers in the army and navy of this State, of and above the rank of Captain, shall be chosen by the senate and house of representatives [of the states] jointly, by ballot in the house of representatives, and commissioned by the governor and commander-in-chief....
>
> XXXIII. That all persons who shall be chosen and appointed to any office or to any place of trust, civil or military, before entering upon the execution of office, shall take the following oath: "I, A. B., do acknowledge the State of South Carolina to be a free, sovereign, and independent State...And I do swear [or affirm, as the case may be] that I will, to the utmost of my power, support, maintain, and defend the said State..., and will serve the said State in the office of ________________, with fidelity and honor, and according to the best of my skill and understanding; So help me God."

3. On March 1, 1781, a general government under the Articles of Confederation was formed. Here are some of the Articles:[2]

> Art. I. The Stile of this confederacy shall be "The United States of America."
>
> Art. II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.
>
> Art. III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of the, on account of religion, sovereignty trade, or any other pretence whatsoever.

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[1] Francis N. Thorpe, ed., *The Federal and State Constitutions* (Washington, 1909), VI, 3248, 3255.

[2] James D. Richardson, ed., *Messages and Papers of the Presidents* (Bureau of National Literature and Art, n.p., 1908), I, 9-10.

> Art. V. ...In determining questions in the United States, in Congress assembled, each state shall have one vote....

4. The powers of the Congress under the Articles of Confederation proved inadequate, however, for the purposes of common defense and general welfare. Soon there was talk of convening a Constitutional Convention to revise the Articles and strengthen the general government. The Convention met in May, 1787, and two basic plans for a new government, the Virginia and the New Jersey Plans, were proposed. In the debate over the plans, Alexander Hamilton, a delegate from New York, delivered a speech on June 18:[3]

> [The experience of other confederations shows that a national government can not exist long when opposed by a weighty rival such as state governments. Because the state will be indifferent to the general welfare of the national government and will show preference for state interests supported by state judges and militia, we must "annihilate" state distinctions and state operations. Hamilton then produced his plan for a government which would consist of two branches possessing the unlimited power of passing all laws. All state laws contravening the general laws would be absolutely void.]

5. Many delegates to the Convention did not agree with Hamilton's views. Robert Yates and John Lansing, also of New York, left the Convention early because they did not like the drift of the debates. A year later in June, 1788, Yates explained why in a letter to the governor of New York:[4]

> We,..., gave the principles of the constitution, which has received the sanction of a majority of the convention, our decided and unreserved dissent; but we must candidly confess, that

---

[3] Saul K. Padover, ed., The World of the Founding Fathers (Thomas Yoseloff, New York, 1960), 208-212, 214.

[4] Jonathan Elliot, ed., The Debates in the Several State Conventions (J. B. Lippincott and Company, Philadelphia, 1859), I, 480-481.

we should have been equally opposed to any system, however modified, which had in object the consolitdation of the United States into one government.

We beg leave, briefly, to state some cogent reasons, which, among others, influenced us to decide against a consolidation of the states. These are reducible into two heads.

1st. The limited and well-defined powers under which we acted, and which could not, on any possible construction, embrace an idea of such magnitude, as to assent to a general constitution, in subversion of that of the state.

2d. A conviction of the impracticabitity of establishing a general government, pervading every part of the United States, and extending essential benefits to all.

Our powers were explicit, and confined to the sole and express purpose of revising the articles of confederation, and reporting such alterations and provisions therein, as should render the federal constitution adequate to the exigencies of government, and the preservation of the union.

From these expressions, we were led to believe, that a system of consolidated government could not in the remotest degree, have been incontemplation of the legislature of this state?...Nor could we suppose, that if it had been the intention of the legislature, to abrogate the existing confederation, they would in such pointed terms, have directed the attention of their delegates to the revision and amendment of it, in total exclusion of every other idea.

Reasoning in this manner, we were of opinion, that the leading feature of every amendment, ought to be the preservation of the individual states, in their uncontrolled constitutional rights, and that in reserving these, a modemight have been devised of granting to the confederacy, the monies arising from a general system of revenue; the power of regulating commerce, and enforcing the observance of foreign treaties, and other necessary matters of less moment.

Exclusive of our objections originating from the want of power, we entertained an opinion, that a general government, however guarded by declarations of rights, or cautionary provisions, must unavoidably, in a short time, be productive of the destruction of the civil liberty of such citizens who could be effectually coerced by it: by reason of the extensive territory of the United States, the dispersed situation of its inhabitants, and the insuperable difficulty of controlling or counteracting the views of a set of men (however unconstitutional and oppressive their acts might be) possessed of all the powers of government; and who from their remoteness from the constituents and necessary permanency of office, could not be supposed to be uniformly actuated by an attention to their welfare and happiness; that however wise and energetic the principles of the general government might be, submission and obedience to its laws, at the distance of many hundred miles from the seat of government; that if the general legislature was composed of so numerous a body of men, as to represent the interests of all the inhabitants of the United States, in the usual and true ideas of representation, the expence of supporting it would become intolerably burdensome; and that if a few only were vested with a power of legislation, the interests of a great majority of the inhabitants of the United States, must necessarily be unknow; or if know, even in the first stages of the operations of the new government, unattended to.

These reasons were, in our opinion, conclusive against any system of consolidated government; to that recommended by the convention, we suppose most of them very forcibly apply...

We were not present at the completion of the new constitution; but before we left the convention, its principles were so well established, as to convince us, that no alteration was to be expected to conform it to our ideas of expediency and safety....

6. From the Constitution of the United States:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Art. I

Sec. 1 All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Sec. 2 The House of Representatives shall be composed of Members chosen every second year by the People of the several States....

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, Which shall be determined by adding to the Whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons...

Sec. 3 The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote....

Sec. 8 The Congress shall have Power to lay and collect Taxes, Duties, Imosts and Excises shall be uniform throught the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and Naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress....

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.

Art. III

Sec. 1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time ordain and establish...

Sec. 2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;--to Controversies between two or more States;--between a State and Citizens of another State;-- between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects....

At. IV

Sec. 2 The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States....

Art. V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the Several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate....

Art. VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...

Art. VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States to ratifying the Same.

Amendments

Art. IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Art. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

7. Many people shared the fears of Robert Yates about the pro-

posed Constitution. Such fears made rati

posed Constitution. Such fears made ratification of the Constitution difficult in several states. In an attempt to allay these fears in New York, and thereby to insure ratification, Alexander Hamilton, James Madison, and John Jay wrote a series of letters to a New York newspaper explaining their understanding of the nature of the Constitution. The thirty-ninth letter, written by Madison, reads as follows:[5]

> But it was not sufficient, say the adversaries of the proposed constitution, for the convention to adhere to the republican form. They ought, with equal care to have preserved the *federal* form, which regards the union as a *confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the union as a *consolidation* of the states. And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires, that it should be examined with some precision.
>
> Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question,...
>
> In order to ascertain the real character of the government it may be considered in relation to the foundation on which it is to be established; to the souces from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.
>
> On examining the first relation, it appears, on one hand, that the constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state - the authority of the people themselves. The act, therefore, establishing the constitution, will not be a *national*, but a *federal* act.
>
> That it will be a federal, and not a national act, as these terms are by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a *majority* of the states. It must result from the *unanimous* assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the

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[5] *The Federalist* (Masters, Smith and Company, n.p., 1852), 176-179. (All subsequent references to *The Federalist* will be to this edition.)

people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the states, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new constitution will, if established, be a federal, and not a national constitution.

The next relation is, to the sources from which the ordinary powers of government are to be derived. The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is national, not federal. The senate, on the other hand, will derive its powers from the states, as political and coequal societies; and these will be represented on the principle of equality in the senate, as they now are in the existing congress. So far the government is federal, not national. The executive power will be derived from a very compound source. The immediate election of the president is to be made by the states in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies; partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act, they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government, it appears to be of a mixed character, presenting at least as many federal as national features.

The difference between a federal and national government, as it relates to the operation of the government, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the constitution by this criterion, it falls under the national, not the federal character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which states may be parties, they must be viewed and proceeded against in their collective and political capacities only. But the operation of the government on the people in their individual capacities, in its ordinary and most essential proceedings, will, on the whole, in the sense of opponents, designate it, in this relation, a national government.

But if the government be national, with regard to the operation of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be contolled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local governments; or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combatted.

If we try the constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and *ultimate* authority would *reside* in the majority of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention, is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character. In rendering the *concurrence of less than the whole number* of states sufficient, it loses again the *federal*, and partakes of the *national* character.

The propsed constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national: in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

PUBLIUS.

SECTION II

ONE NATION, INDIVISIBLE?

The Constitution solved the problem of sovereignty by compromise, by creating a system of governmnet called "federalism." The selections in this section provide information which will be helpful in evaluating satisfaction with the compromise. In Part A you will find representative statements by Americans regarding their feelings toward the new American nation. Part B contains documents relevant to an examination of the actual operation of American federalism. As you read each document in this section ask yourself how that particular author might write a pledge of allegiance.

A. The Growth of Nationalism

1. In 1944 a modern historian made these remarks about nationalism:[1]

> Nationalism is the "integration of the masses of the people into a common political form", and the nation state is the ideal form of political organization according to the idea of nationalism. The most common objective factors important in the formation of nationalism are "common descent, language, territory, political entity, customs and traditions, and religion." As nationalism is a state of mind, however, "the most essential element is a living and active corporate will."

2. In nullifying the Force Bill in 1833, a bill which Congress had passed to enforce the tariff of 1832, the people of South Carolina expressed these feelings about citizenship:[2]

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[1] Hans Kohn, The Idea of Nationalism (The Macmillan Company, New York, 1944), 4-6, 9-10, 12-16.

[2] Nile's Weekly Register, XLIV (March 30, 1833), 75.

> We, the People of the State of South Carolina...do further Declare and Ordain, that the allegiance of the citizens of this State, while they continue such, is due to the said State; and that obddience only, and not allegiance, is due by them to any other power or authority, to whom a control over them has been, or may be delegated by the State; and the General Assembly of the said State is hereby empowered, from time to time, when they may deem it proper, to provide for the administration to the citizens and officers of the State, or such of the nations, binding them to the observance of such allegiance; and abjuring all other allegiance; and, also, to define what shall amount to a violation of their allegiance, and to provide the proper punishment for such violation.

3. Daniel Webster explains his affection for the nation in a speech delivered in the Senate on January 26, 1830:[3]

> It is to [the] Union we owe our safety at home, and our consideration and dignity abroad. It is to that Union that we are chiefly indebted for whatever makes us most proud of our country. That Union we reached only by the discipline of our virtues in the severe school of adversity. It had its origin in the necessities of disordered finance, prostrate commerce, and ruined credit. Under its benign influences, these great interests immediately awoke, as from the dead, and sprang forth with newness of life. Every year of its duration has teemed with fresh proofs of its utility and its blessings; and although our territory has stretched out wider and wider, and our population spread farther and farther, they have not outrun its protection or its benefits. It has been to us all a copious fountain of national, social, and personal happiness....
>
> While the Union lasts, we have high, exciting, gratifying prospects spread out before us, for us and our children. Beyond that I seek not to penetrate the veil. God grant that in my day, at least, that curtain may not rise! God grant that on my vision never may be opened what lies behind! When my eyes shall be turned to behold for the last time the sun in heaven, may I not see him shining on the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant,belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal boood! Let their last feeble and lingering glance rather behold the gorgeous ensign of the republic, now know and honored throughout the earth, still full high advanced, its arms and trophies streaming in their original lustre, not a stripe erased or polluted, nor a single star obscured, bearing for its motto, no such miserable interrogatory as "What is all this worth?" nor those other words of delusion and folly, "Liberty first and Union afterwards"; but everywhere, spread all over in characters of living light, blazing on all its ample folds, as they float over the sea and over the land, and in every wind under the whole heavens, that

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[3] The Writings and Speeches of Daniel Webster (Little, Brown, and Company, Boston, 1903), VI, 74-75.

blazing on all its ample folds, as they float over the sea and over the land, and in every wind under the whole heavens, that other sentiment, dear to every true American heart, -- Liberty and Union, now and forever, one and inseparable!

4. During the debates in the Constitutional Convention in 1787, James Wilson of Pennsylvania had this to say about American government:[4]

> If we mean to establish a national Government the States must submit themselves as individuals--the lawful Government must be supreme--either the General or the State Government must be supreme. We must remember the language with which we began the Revolution; and it was this, Virginia is no more, Massachusetts is normore--we are one in name, let us be one in Truth and Fact.... Unless the General Government can check their State laws they may involve the Nation in Tumult and Confusion....

5. The following editorial appeared in the Burlington, Vermont, Daily Times on May 14, 1861:[5]

> [The editorial stated that we are not a homogeneous country. American civilization has streamed across the country from two centers, "Plymouth Rock and Jamestown". These two streams are radically different. They stemmed from different ideas, have different aims and different institutions. The gap between them is one that only time can breach. Eventually there "shall be one people" for "Virginia must come to Massachusetts."]

6. Upon leaving the Presidency in 1797, George Washington exhorted Americans as follows:[6]

> The Unity of Government which consitutes you one people is also now dear to you. It is justly so; for it is a main Pillar in the Edifice of your real independence, the support of your tranquility at home; your peace abroad; of your safety;

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[4] Max Farrand, ed., The Records of the Federal Convention of 1787 (Yale University Press, New Haven, 1911), I, 172.

[5] Howard C. Perkins, ed., Northern Editorials on Secession (D. Appleton Century Company, New York, 1942), I, 531-533. (Reprinted by permission of American Historical Association.)

[6] John C. Fitzpatrick, ed., The Writings of George Washington (G.P.O., Washington, 1940), XXXV, 218-220, 222.

of your prosperity; of that very Liberty which you so highly prize....It is of infinite moment that you should properly estimate the immense value of your national Union to your collective and individual happiness, ... [that you should watch] for its preservation with jealous anxiety;... [and frown] upon the first dawning of every attempt to alienate any portion of our Country from the rest, or to enfeeble the sacred ties which now link together the various parts.

For this you have every inducement of sympathy and interest. Citizens by birth or choice, of a common country, that country has a right to concentrate your affections. The name of AMERICAN, which belongs to you, in your national capactiy, must always exalt the just pride of Patriotism, more than any appellation derived from local discriminations. With slight shades of difference, you have the same Religeon, Manners, Habits and political Principles. You have in a common cause fought and triumphed together. The independence and liberty you possess are the work of joint councils, and joint efforts; of common dangers, sufferings and successes....

[A common heritage and a community of interests] speak a persuaive language to every reflecting and virtuous mind, and exhibit the continuance of the UNION as a primary object of Patriotic desire.

7. Alexander Hamilton in the eighty-fifth Federalist, 1788:[7]

A NATION, without a NATIONAL GOVERNMENT, is an awful spectacle.

8. The "true nature" of the American nation, as described by John C. Calhoun on July 26, 1831:[8]

The question of the relation which the States and General Government bear to each other is not one of recent origin. From the commencement of our system, it had divided public sentiment. Even in the convention, while the Constitution was struggling into existence, there were two parties as to what this relation should be, whose different sentiments constituted no small impediment in forming that instrument. After the General Government went into operation, experience soon proved that the question had not terminated with the labors of the Convention....

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[7] The Federalist, 404.

[8] Speeches of John C. Calhoun (Harper and Brother, New York, 1843), 27-30.

The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described; and that the several States, or parties, have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, "to interpose for arresting the progress of the evil, and formaintaining, within their respective limits, the authorities, rights, and liberties appertaining to them." This right of interposition, thus solemnly asserted by the State of Virginia, be it called what it may, -- State-right, veto, nullification, or by any other name, -- I conceive to be the fundamental principle of our system, resting on facts historically as certain as our revolution itself, and deductions as simple and demonstrative as that of any political or moral truth whatever; and I firmly believe that on its recognition depend the stability and safety of our political institutions.

I am not ignorant that those opposed to the doctrine have always, now and formerly, regarded it in a very different light, as anarchical and revolutionary. Could I believe such, in fact, to be its tendency, to me it would be no recommendation. I yield to none, I trust, in a deep and sincere attachment to our political institutions and the union of these States. I never breathed an opposite sentiment; but, on the contrary, I have ever considered them the great instruments of preserving our liberty, and promoting the happiness of our selves and our posterity; and next to these I have ever held them most dear. Nearly half my life has been passed in the service of the Union, and whatever public reputation I have acquired is indissolubly identified with it. To be too national has, indeed, been considered by many, even of my friends, my greatest political fault.

With these strong feelings of attachment, I have examined, with the utmost care, the bearing of the doctrine in question; and, so far from anarchical or revolutionary, I solemnly believe it to be the only solid foundation of our system, and of the Union itself; and that the opposite doctrine, which denies to the States the right of protecting their reserved powers, and which would vest in the General Government (it matters not through what department) the right of determining, exclusively and finally, the powers delegated to it, is incompatible with the sovereignty of the States, and of the Constitution itself, considered as the basis of a Federal Union....

Where the interests are the same, that is, where the laws that may benefit one will benefit all, or the reverse, it is just and proper to place them under the control of the majority; but where they are dissimilar, so that the law that may benefit one portion may be ruinous to another, it would be, on the contrary, unjust and absurd to subject them to its will; and such I conceive to be the theory on which our Constitution rests.

That such dissimilarity of interests may exist, it is impossible to doubt. They are to be found in every community, in a greater or less degree, however small or homogenous; and they constitute every where the great difficulty of forming and preserving free institutions. To guard against the unequal action of the laws, when applied to dissimilar and opposing interests, is, in fact, what mainly renders a constitution indispensable; to overlook which, in reasoning on our Constitution, would be to omit the principal element by which to determine its character. Were there no contrariety of interests, nothing would be more simple and easy then to form and preserve free institutions. The right of suffrage alone would be a sufficient guarantee. It is the conflict of opposing interests which renders it the most difficult work of man.

Where the diversity of interests exists in separate and distinct classes of the community, as is the case in England, and was formerly the case in Sparta, Rome, and most of the free States of antiquity, the rational constitutional provision is, that each should be represented in the governments, as a separate estate, with a distinct voice, and a negative on the acts of its co-estates, in order to check their encroachments....

Happily for us, we have no artifical and separate classes of society. We have wisely exploded all such distinctions; but we are not, on that account, exempt from all contrariety of interests, as the present distracted and dangerous condition of our country, unfortunately, but too clearly proves....

So numerous and diversified are the interests of our country, that they could not be fairly represented in a single government, organized so as to give to each great and leading interest a separate and distinct voice, as in governments to which I have referred. A plan was adopted better suited to our situation, but perfectly novel in its character. The powers of government were divided, not, as heretofore, in reference to classes, but geographically. One General Government was formed for the whole, to which were delegated all the powers supposed to be necessary to regulate the interests common to all the States, leaving others subject to the separate control of the States, being, from their local and peculiar character, such that they could not be subject to the will of a majority of the whole Union, without the certain hazard of injustice and oppression. It was thus that the interests of the whole were subjected, as they ought to be, to the will of the whole, while the peculiar and local interests were left under the control of the States separately, to whose custody only they could be safely confided. This distribution of power, settled solemnly by a constitutional compact, to which all the states are parties, constitutes the peculiar character and excellence of our political system. It is truly and emphatically American, without example or parallel.

> To realize its perfection, we must view the General Government and those of the States as a whole, each in its proper sphere independent; each perfectly adapted to its respective objects; the States acting separately, representing and protecting the local and peculiar interests; and acting jointly through the General Government, with the weight respectively assigned to each by the Constitution, representing and protecting the interests of the whole; and thus perfecting, by an admirable but simple arrangement, the great principle of representation and responsibility, without which no government can be free or just. To preserve this sacred distribution as originally settled, by coercing each to move in its prescribed orbit, is the great and difficult problem, on the solution of which the duration of our Constitution, of our Union, and, in all probability, our liberty depends....

B. Sovereignty and Allegiance Under the Early Constitution

1. The Constitution was ratified in 1788. Three years later the first ten amendments were adopted. The first amendment prohibited Congress from making any law "abridging the freedom of speech." In 1798 Congress attempted to curb criticism of the Adams administration by passing the Sedition Act, which, among other things, made it illegal to "write, print, utter, or publish" anything "false, scandalous and malicious" againt the government or President of the United States. In response the states of Virginia and Kentucky published resolutions of protest. The Kentucky Resolutions, drafted by Thomas Jefferson, reads in part as follows:[9]

> I. Resolved, that the several States composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself,

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[9] N. S. Shaler, Kentucky(Houghton, Mifflin, and Company, Boston, 1885)) 410-411.

> the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void,and of no force: That to this compact each States acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made it discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress....
>
> III. Resolve, that it is true as a general principle , and is also expressly declared by one of the amendments to the Constitution that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people"...And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, defamation equally with heresy and false religion, are withheld from the cognizance of Federal tribunals. That therefore [the Sedition Act], which does abridge the freedom of the press, is not law but is altogether void and of no effect...

2. The Republican administrations of Jefferson and Madison followed the Federalist Adams, and neither were destined for popularity in Federalist New England. Many of Jefferson's and Madison's policies were contrary to the immediate interests of the Atlantic states: the new states which were taking their seats in the Senate were from the West; an embargo on all shipping was passed in 1807 in retaliation to English harassment of American ships; and in 1812 a war with England was declared despite the opposition of the New England states. In 1814 delegates from all of the New England states met in Hartford, Connecticut, and on January 4, 1815, they issued the following "Report and Resolutions":[10]

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[10] Theodore Dwight, History of the Hartford Convention (Russell, Odiorne, and Company, Boston, 1833), 376-378.

Therefore Resolved,

That it be and hereby is recommended to the legislatures of the several states represented in this Convention, to adopt all such measures as may be necessary effectually to protect the citizens of said states from the operation and effects of all acts which have been or may be passed by the Congress of the United States, which shall contain provisions, subjecting the militia or other citizens to forcible drafts, conscriptions, or impressments, not authorised by the constitution of the United States.

Resolved, That it be and hereby is recommended to the said Legislatures, to authorize an immediate and earnest application to be made to the government of the United States, requesting their consent to some arrangement, whereby the said states may, separately or in concert, be empowered to assume upon themselves the defence of their territory against the enemy; and a reasonable portion of the taxes, collected within said states, may be paid into the respective treasuries thereof, and appropriated to the payment of the balance due said states, and to the future defence of the same. The amount so paid into the said treasuries to be credited, and the disbursements made as aforesaid to be charged to the United States.

Resolved, That it be, and hereby is, recommended to the legislatures of the aforesaid states, to pass laws (where it has not already been done) authorizing the governors or commanders-in-chief of their militia to make detachments from the same, or to form voluntary corps, as shall be most convenient and conformable to their constitutions, and to cause the same to be well armed, equipped, and disciplined, and held in readiness for service; and upon the request of the governor of either of the other states to employ the whole of such detachment or corps, as well as the regular forces of the states, or such part thereof as may be required and can be spared consistently with the safety of the state, in assisting the state, making such request to repel any invasion thereof which shall be made or attempted by the public enemy....

Resolved, That if the application of these states to the government of the United States, recommended in a foregoing resolution, should be unsuccessful and peace should not be concluded, and the defense of these states should be neglected, as it has since the commencement of the war, it will, in the opinion of this convention, be expedient for the legislatures of the several states to appoint delegates to another convention, to meet at Boston...with such powers and instructions as the exignecy of a crisis so momentous may require.

3. In 1832 Congress passed a tariff bill which some Southerners felt to be discriminatory against their part of the country. The legislature of South Carolina discussed the tariff law and on November 24 passed the following ordinance:[11]

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[11] Niles Weekly Register, XLIII (December 1, 1832), 219-220.

An Ordinance for arresting the operation of certain acts of the Congress of the United States, purporting to be laws laying duties and imposts on the importation of foreign commodities.

1. Whereas the Congress of the United States, by various acts, purporting to be acts laying duties and imposts on foreign imports, but in reality intended for the protection of domestic manufactures, and the giving of bounties to classes and individuals engaged in particular employments, at the expense and to the injury and oppression of other classes and individuals,...hath exceeded its just powers under the Constitution, which confers on it no authority to affort such protection, and hath violated the true meaning and intent of the Constitution, which provides for equality in imposing the burthens of taxation upon the several States and portions of the Confederacy: And whereas the said Congress, exceeding its just power to impose taxes and collect revenue for the purpose of effecting and accomplishing the specific objects and purposes which the Constitution of the United States authorizes it to effect and accomplish, hath raised and collected unnecessary revenue for objects authorized by the Constitution:--

2. We, therefore, the people of the State of South Carolina in Convention assembled, do declare and ordain,...that the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities,...and, more especially...[the tariff acts of 1828 and 1832]...,are unauthroized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null, void, and no law, nor binding upon this State, its officers or citizens....

6. And we, the People of South Carolina, to the end that it may be fully understood by the Government of the United States, and the people of the co-States, that we are determined to maintain this, our Ordinance and Declaration, at every hazard, Do further Declare, that we will not submit to the application of force, on the part of the Federal Government, to reduce this State to obedience; but that we will consider the passage, by Congress, of any act...to coerce the State, shut up her ports, destroy or harass her commerce, or to enforce the acts hereby declared to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union: and that the people of this State will thenceforth hold themselves absolved from all further obligation to maintain or preserve their political connexion with the people of the other States and will forthwith proceed to organize a separate Government, and do all other acts and things which sovereign and independent States may of right to do.

4. President Jackson, a political descendant of the party of Thomas Jefferson, felt that South Carolina's challenge to national authority should not go unanswered. Consequently, on December 10, 1832, Jackson issued a "Proclamation to the People of South Carolina" in which he

repled to the South Carolina ordinance:[12]

> The ordinance [of South Carolina] is founded, not on the indefeasible right of resisting acts which are plainly unconstitutional and too oppressive to be endured, but on the strange position that any one State may not only declare an act of Congress void, but prohibit its execution; that they may do this consistently with the Constitution; that the true construction of that instrument permits a State to retain its place in the Union and yet be bound by no other of its laws than those it may choose to consider as constitution. It is true, they add, that to justify this abrogation of a law it must be palpably contrary to the Constitution; but it is evident that to give the right of resisting laws of that description, coupled with the uncontrolled right to decide what laws deserve that character, is to give the power of resisting all laws; for as by the theory there is no appeal, the reasons alleged by the State, good or bad, must prevail.... There are two appeals from an unconstitutional act passed by Congress -- one to the judiciary, the other to the people and the States. There is no appeal from the State decision in theory, and the practical illustration shows that the courts are closed against an application to review it, both judges and jurors being sworn to decide in its favor. But the reasoning on this subject is superfluous when our social compact, in express terms, declares that the laws of the United States, its Constitution, and treaties made under it are the supreme law of the land, and for greater caution, adds "that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." And it may be asserted without fear of refutation that no federative government could exist without a similar provision.
>
> If this doctrine [nullification] had been established at an earlier day, the Union would have been dissolved in its infancy. The excise law in Pennsylvania, the embargo and nonintercourse law in the Eastern States, the carriage tax in Virginia, were all deemed unconstitutional, and were more unequal in their operation than any of the laws now complained of; but, fortunately, none of those States discovered that they had the right now claimed by South Carolina....
>
> If the doctrine of a State veto upon the laws of its impracticable absurdity, our constitutional history will also afford abundant proof that it would have been repudiated with indignation had it been proposed to form a feature in our Government....
>
> Our Present [happy] Constitution was formed...in vain if this fatal doctrine prevails. It was formed for important objects that are announced in the preamble, made in the name and by the authority of the people of the United States, whose delegates framed and whose conventions approved it. The most important among these objects - that which is

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[12] James D. Richardson, ed., Messages and Papers, II, 641-643, 645, 648-650, 652, 654.

placed first in rank, on which all the others rest - is "*to form a more* perfect union." Now, it is possible that even if there were no express provision giving supremacy to the Constitution and laws of the United States over those of the States, can it be conceived that an instrument made for the purpose of "*forming a more perfect union*" than that of the Confederation could be so constructed by the assembled wisdom of our country as to substitute for that Confederation a form of government dependent for its existence on the local interest, the party spirit, of a State, or of a prevailing faction in a State? Every man of plan, unsophisticated understanding who hears the question will give such an answer as will preserve the Union....

I consider, then, the power to annul a law of the United States, assumed by one State, uncompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.

Search the debates [of the framers] in all their conventions, examine the speeches of the most zealous opposers of Federal authority, look at the amendments that were proposed; they are all silent - not a syllable uttered, not a vote given, not a motion made to correct the explicit supremacy given to the laws of the Union over those of the States....No; we have not erred. The Constitution is still the object of our reverence, the bond of our Union, our defense in danger, the source of our prosperity in peace. It shall descend, as we have received it, uncorrupted by sophistical construction, to our posterity; and the sacrifices of local interest, of State prejudices, of personal animosities, that were made to bring it into existence, will again be patriotically offered for its support....

This right to secede is deduced from the nature of the Constitution, which, they say, is a compact between sovereign States who have preserved their whole sovereignty and therefore are subject to no superior; that because they made the compact they can break it when in their opinion it has been departed from by the other States. Fallacious as this course of reasoning is, it enlists State pride and finds advocates in the honest prejudices of those who have not studied the nature of our Government sufficiently to see the radical error on which it rests....

The Constitution of the United States, then, forms a *government*, not a league; and whether it be formed by compact between the States or in any other manner, its character is the same. It is a Government in which all the people are represented, which operates directly on the people individually, not upon the States; they retained all the power they did not grant. But each State, having expressly parted with so many powers as to constitute, jointly with the other States, a single nation, can not, from that period, possess any right to secede, because such secession does not break a league, but destroys the unity of a nation; and any injury to that unity is not only a breach which would result from the contravention of a compact, but it is an offense against the whole Union. To say that any State may at pleasure secede from the Union is to say that the United States are not a nation.....

> Because the Union was formed by a compact, it is said the parties to that compact may, when they feel themselves aggrieved, depart from it; but it is precisely because it is a compact that they can not. A compact is an agreement or binding obligation..... An attempt, by force of arms, to destroy a government is an offense, by whatever means the constitutional compadt may have been formed; and such government has the right by the law of self-defense to pass acts for punishing the offender....
>
> The States severally have not retained their entire sovereignty. It has been shown that in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty. The right to make treaties, declare war, levy taxes, exercise exclusive judicial and legislative powers, were all of them functionsoof sovereign power. The States, then, for all these important purposes were no longer sovereign....How, then, with all these proofs that under all changes of our position we had, for designated purposes and with defined powers, created national governments, how is it that the most perfect of those several modes of union should now be considered as a mere league that may be dissolved at pleasure? It is from an abuse of terms. Compact is used as synonymous with league, although the true term is not employed, because it would at once show the fallacy of the reasoning. It would not do to say that our Constitution was only a league, but it is labored to prove it a compact (which in one sense it is) and then to argue that as a league is a compact every compact between nations must of course be a league, and that from such an engagement every sovereign power has right to receed. But it has been shown that in this sense the States are not sovereign, and that even if they were, and the national Constitution had been formed by compact, there would be no right in any one State to exonerate itself from its obligations.
>
> This, then, is the position in which we stand: A small majority of the citizens of one State in the Union have elected delegates to a State convention; that convention has ordained that all the revenue laws of the United States must be repealed, or that they are no longer a member of the Union....
>
> If your leaders could succeed in establishing a separation, what would be your situation?...Be not deceived by names. Disunion by armed force is treason....

5. Abraham Lincoln made the following remarks in Chicago on July 10, 1858, during his debate with Stephen A. Douglas:[13]

> Those arguments that are made, that the inferior race are to be treated with as much allowance as they are capable of enjoying; that as much is to be done for them as their condition will allow.

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[13] John G. Nicolay and John Hay, eds., Complete Works of Abraham Lincoln (Francis D. Tandy Company, New York, 1894), III, 49-51.

What are these arguments? They are the arguments that kings have made for enslaving the people in all ages of the world. You will find that all the arguments in favor of kingcraft were of this class; they always bestrode the necks of the people, not that they wanted to do it, but because the people were better off for being ridden. That is their argument, and this argument of the Judge is the same old serpent that says, you work, and I eat, you toil, and I will enjoy thefruits of it. ...I should like to know - taking this old Declaration of Independents, which declares that all men are equal upon principle, and making exceptions to it, - where will it stop? If one man says it does not mean a negro, why may not another say it does not mean some other man? If that Declaration is not the truth, let us get the Statute book in which we find it and tear it out! Who is so bold as to do it! If it is not true let us tear it out! [cries of "No, no,"] let us stick to it then [cheers]. Let us stand firmly by it, then....

My friends, I have detained you about as long as I desired to do, and I have only to say, let us discard all this quibbling about this man and the other man, this race and that race and the other race being inferior, and therefore they must be placed in an inferior position...Let us discard all these things, and unit as one people throughout this land, until we shall once more stand up declaring that all men are created equal.

6. On December 24, 1860, shortly after Lincoln's election to the Presidency, South Carolina issued the declaration printed below. Note, as you read it, what the declaration has to say about nullification and the supreme law of the land.[14]

[The] State of South Carolina having resumed her separate and equal place among nations, deems it due to herself, to the remaining United States of America, and to the nations of the world, that she should declare the immediate causes which have led to [secession]....

[The] laws of the General Government, have ceased to effect the objects of the Constitution. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the acts of Congress, [Fugitive Slave Laws] or render useless any attempt to execute them....

Thus the constitutional compact has been deliberately broken and disregarded by the non-slaveholding States; and the consequence follows that South Carolina is released from her obligation....

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[14] F. Moore, ed., The Rebellion Record (G. P. Putnam, New York, 1861), I, 3-4.

We affirm that these ends for which this Government was instituted have been defeated, and the Government itself has been destructive of them by the action of the non-slaveholding States. Those States have assumed the right of deciding upon the propriety of our domestic institutions; and have denied the rights of property established in fifteen of the States and recognized by the Constitution; they have denounced as sinful the institution of Slavery....

For twenty-five years this agitation has been steadily increasing, until it has now secured to its aid the power of the common Government. Observing the forms of the Constitution, a sectional party has found within that article establishing the Executive Department, the means of subverting the Constitution itself. A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States whose opinions and purposes are hostile to Slavery. He is to be intrusted with the administration of the common Government, because he has declared that "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that Slavery is in the course of ultimate extinction.

This sectional combination for the subversion of the Constitution has been aided, in some of the States, by elevating to citizenship persons who, by the supreme law of the land, are incapable of becoming citizens; and their votes have been used to inaugurate a new policy, hostile to the South, and destructive of its peace and safety.

On the 4th of March next this party will take possession of the Government. It has announced that...a war must be waged against Slavery until it shall cease throughout the United States.

The guarantees of the Constitution will then no longer exist; the equal rights of the States will be lost. The Slaveholding States will no longer have the power of self-government, or self-protection, and the Federal Government will have become their enemy....

We, therefore, the people of South Carolina, by our delegates in Convention assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly declared that the Union heretofore existing between this State and the other States of North America is dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent state, with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.

SECTION III

THE FRAMING OF THE NEW CONSTITUTION

If a resurrection of the old arguments over sovereignty was to be avoided, the constitutional ambiguities of allegiance under a federal system of government would have to be cleared up. The relationship of sovereign and citizen in America would have to be reformulated. The Union victory in the Civil War provided the opportunity for such a reformulation.

In the documents in this section you will be studying some of the constitutional changes made after the war. The thinking of Americans about sovereignty in this period is varied; and the feelings of at least three important groups of people - the Radical Republicans of the North, the former Confederates, and the Negro - can be discerned in the readings that follow. You will want to see what each of these groups thought about sovereignty. In addition, it will be helpful if you will keep three questions especially in mind: (1) What do these documents say about the relationship of power to sovereignty: (2) What fundamental changes are being made in the federal system of government? and (3) How do these changes affect the allegiance of the individual citizen?

1. In 1857 the Supreme Court ruled on the status of the Negro in the United States in the Dred Scott decision. Scott, a slave, had been taken by his master from a slave state, Missouri, to a free state, Illinois. After traveling also to a free territory, Wisconsin, Scott was returned to Missouri. Claiming that his travels to a free state and territory had made him free, Scott sued in the federal courts in Missouri for his freedom. The case was appealed to the Supreme Court, and Chief Justice Taney

included these remarks in his opinion:[1]

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?
>
> It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the work citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is of persons who are the descendants of Africans who were imported into this country and sold as slaves....
>
> We proceed to examine the case as presented by the pleadings.
>
> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word, "citizens" in the Constitution and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them....
>
> In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the

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[1] Dred Scott v. Sandford, 19 Howard 393, 403-406.

> rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and comity of States....
>
> It is very clear, therefore, that no State can by any Act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

2. Many people in the North, including President Lincoln, subscribed to the position taken by the Concord New Hampshire Patriot and State Gazette in an editorial entitled "The Object of the War" which was published on May 8, 1861:[2]

> [Various northern editorials and speeches have raised the vital question as to the aims and purposes of the war: Is this a war to save the Union and the Constitution or is it a crusade to abolish slavery? If the former, it must and will be supported vigorously by the North; if the latter, it is a "wicked and treasonable war" designed to destroy the rights of the South which are recognized in the Constitution and will not be supported by anyone who loves the Union and reveres the Constitution. We do not doubt the President and his advisors embarked into this great contest to save the Union and have not given "countenance" to those who would charge the nature of the struggle.]

3. From the Emancipation Proclamation, January 1, 1863:[3]

> BY THEPRESIDENT OF THE UNITED STATES OF AMERICA:
>
> A Proclamation.
>
> ...Now, therefore, I, Abraham Lincoln, President of the United States by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do,...order and designate as the States and parts of States wherein the people thereof, respectively, are this day in rebellion against the United STates the following, to wit: [a list of the rebel states is included]

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[2] Howard C. Perkins, ed., Northern Editorials, II, 830.

[3] U.S. Statutes at Large, XII, 1268-1269.

> And by virtue of the power and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States are, and henceforward shall be, free....
>
> And upon this act, sincerely believed to be an act of justice, warrented by the Constitution upon military necessity, I invoke the considerate judgement of mankind and the gracious favor of Almighty God.

4. The Thirteenth Amendment became part of the Constitution on December 18, 1865. As a precondition of reunion, President Johnson had required the Southern states to ratify it.

> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

5. The following parish regulations for freed slaves in Louisiana went into effect in 1865 shortly after the end of the war:[4]

> Whereas it was formerly made the duty of the police jury to make suitable regulations for the police of slaves within the limits of the parish; and whereas slaves have become emancipated by the action of the ruling powers; and whereas it is necessary for public order, as well as for the comfort and correct deportment of said freedmen, that suitable regulations should be established for their government in their changed condition, the following ordinances are adopted with the approval of the United States military authorities commanding in said parish, viz:
>
> Sec. 1. Be it ordained by the police jury of the parish of St. Landry, That no negro shall be allowed to pass within the limits of said parish without special permit in writing from his employer. Whoever shall violate this provision shall pay a fine of two dollars and fifty cents, or in default thereof shall be forced to work four days on the public road, or suffer corporeal punishment as provided hereinafter.
>
> Sec. 2. ..Every negro who shall be found absent from the residence of his employer after ten o'clock at night, without a written permit from his employer, shall pay a fine of five dollars, or in default thereof, shall be compelled to work five days on the public road, or suffer corporeal punishment as hereinafter provided.

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[4] Walter L. Fleming, Documentary History of Reconstruction (Arthur H. Clark Company, Cleveland, 1906), I, 279-281.

Sec. 3...No negro shall be permitted to rent or keep a house within said parish. Any negro violating this provision shall be immediately ejected and compelled to find an employer; and any person who shall rent, or give the use of any house to any negro, in violation of this section, shall pay a fine of five dollar for each offence.

Sec. 4...Every negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro. But said employer or former owner may permit said negro to hire his own time by special permission in writing, which permission shall not extend over sevendays at any one time. Any negro violating the provisions of this section shall be fined five dollars for each offence, or in default of the payment thereof shall be forced to work five days on the public road, or suffer corporeal punishment as hereinafter provided.

Sec. 5...No public meetings or congregations of negroes shall be allowed within said parish after sunset; but such public meetings and congregations may be held between the hours of sunrise and sunset, by the special permission in writing of the captain of patrol, within whose beat such meetings shall take place. This prohibition, however, is not to prevent negroes from attending the usual church services, conducted by white ministers and priests. Every negro violating the provisions of this section shall pay a fine of five dollars, or in default thereof shall be compelled to work five days on the public road, of suffer corporeal punishment as hereinafter provided.

Sec. 6...No negro shall be permitted to preach, exhort or otherwise declaim to congregations of colored people, without a special permission in writing fromtthe president of the police jury. Any negro violating the provisions of this section shall pay a fine of ten dollars, or in default shall be forced to work ten days on the public road, or suffer corporeal punishment as hereinafter provided.

Sec. 7...No negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special written permission of his employers, approved and endorsed by the nearest and most convenient chief of patrol. Any one violating the provisions of this section shall forfeit his weapons and pay a fine of five dollars, or in default of the payment of said fine, shall be forced to work five days on the public road, or suffer corporeal punishment as hereinafter provided.

Sec. 8...No negro shall sell, barter, or exchange any articles of merchandise or traffic within said parish without the special written permission of his employer, specifying the article of sale, barter or traffic. Any one thus offending shall pay a fine of one dollar for each offence, and suffer the forteiture of said articles, or in default of the payment of said fine shall work one day on the public road, or suffer corporeal punishment as hereinafter provided....

Sec. 9...Any negro found drunk, within the said parish shall pay a fine of five dollars, or in default thereof work five days on the public road, or suffer corporeal punishment as hereinafter provided.

Sec. 11... It shall be the duty of every citizen to act as a police officer for the detection of offences and the apprehenshion of offenders, who shall be immediately handed over to the proper captain or chief of patrol...

Sec. 14... The corporeal punishment provided for in the foregoing sections shall consist in confining the body of the offender within a barrel placed over his or her shoulders, in the manner practiced in the army, such confinement not to continue longer than twelve hours, and for such time within the aforesaid limit as shall be fixed by the captain or chief of patrol who inflicts the penalty.

6. From the Civil Rights Act of 1866:[5]

An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as it enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statue, ordinance, regulation, or custom, to the contrary notwithstanding....

7. President Andrew Johnson on the Civil Rights Act:[6]

I regret that the [Civil Rights] bill...contains provisions which I can not approve consistently with my sense of duty to the whole people and my obligations to the CConstitution of the United States, I am therefore constrained to return it to the Senate, the House in which it originated, with by objections to its becoming a law.

By the first section of the bill all persons born in the UnitedStates and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States....It does not purport to give these classes of persons any status as citizens of States, except that which may result from their status as citizens of the United States. The power to confer the right of State citizenship is just as exclusively with the several States as the power to confer the right of Federal citizenship is with Congress.

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[5] U.S. Statutes at Large, XIV, 27.

[6] James D. Richardson, ed., Messages and Papers, VI, 405-408, 412-413.

The right of Federal citizenship thus to be conferred on the several excepted races before mentioned is now for the first time proposed to be given by law. If , as it claimed by many, all persons who are native born already are, by virtue of the Constitution, citizens of the United States, the passage of the pending bill can not be necessary to make them such, the grave question presents itself whether, when eleven of the thirty-six States are unrepresented in Congress at the present time, it is sound policy to make our entire colored population and all other excepted classes citizens of the United States. Four millions of them have just emerged from slavery into freedom....

The first section of the bill also contains an enumeration of the rights to be enjoyed by these classes so made citizens "in every State and Territory in the United States." These rights are "to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property," and to have "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens." So, too, they are made subject to the same punishment, pains, and penalties in common with white citizens, and to none other. Thus a perfect equality of the white and colored races is attempted to be fixed by Federal law in every State of the Union over the vast field of State jurisdiction covered by these enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races....

Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal police and economy of the respective States. They are matters which in each State concern the domestic condition of its people....If it be granted that Congress can repeal all State laws discriminating between whites and blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal in the same way all State laws descriminating between the two races on the subjects of suffrage and office? If Congress can declare by law to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and finally, to vote "in every State and Territory of the United States."...

In all our history, in all our experience as a people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State - an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government.

> The tendency of the bill must be to resuscitate the spirit of rebellion and to arrest the progress of those influences which are more closely drawing around the States the bonds of union
>
> ANDREW JOHNSON.

8. In a speech in Congress on December 18, 1865, Thaddeus Stevens of Pennsylvania took a radical approach to the problem of reuniting the states:[7]

> The late rebel States have lost their constitutional relations to the Union, and are incapable of representation in Congress, except by permission of the Government. It matters but little, with this admission, whether you call them States out of the Union, and now conquered territories, or assert that because the Constitution forbids them to do what they did do, that they are therefore only dead as to all national and political action, and will remain so until the Government shall breathe into them the breath of life anew and permit them to occupy their former position. In other words, that they are not out of the Union, but are only dead carcasses lying within the Union. In either case, it is very plain that it requires the action of Congress to enable them to form a State government and send representatives to Congress. Nobody, I believe, pretends that with their old constitutions and frames of government they can be permitted to claim their old rights under the Constitution. They have torn their constitutional States into atoms, and built on their foundations fabrics of a totally different character. Dead men cannot raise themselves. Dead States cannot restore their existence "as it was." Whose especial duty is it to do? In whom does the Constitution place the power? Not in the judicial branch of Government, for it only adjudicates and does not prescribe laws. Not in the Executive, for he only executes and cannot make laws. Not in the Commander-in-Chief of the armies, for he can only hold them under military rule until the sovereign legislative power of the conqueror shall give them law. Unless the law of nations is a dead letter, the late war between two acknowledged belligerents severed their original compacts and broke all the ties that bound them together. The future condition of the conquered power depends on the will of the conqueror. They must come in as new states or remain as conquered provinces. Congress...is the only power that can act in the matter.
>
> Congress alone can do it...Congress must create States and declare when they are entitled to be represented....
>
> It is obvious from all this that the first duty of Congress is to pass a law declaring the condition of these outside or defunct States, and providing proper civil governments for them. Since the conquest they have been governed by martial law. Military rule is necessarily despotic, and ought not to exist longer than is absolutely necessary. As there are no symptoms that the people of these provinces will be prepared to

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[7] Walter L. Fleming, Documentary History, I, 147-149.

> participate in constitutional government for some years, I know of no arrangement so proper for them as territorial governments. There they can learn the principles of freedom and eat the fruit of foul rebellion. Under such governments, while electing members to the territorial legislatures, they will necessarily mingle with those to whom Congress shall extend the right of suffrage. In Territories Congress fixes the qualifications of electors; and I know of no better place nor better occasion for the conquered rebels and the conqueror to practice justice to all men, and accustom themselves to make and obey equal laws...
>
> They ought never to be recognized as capable of acting in the Union, or of being counted as valid States, until the Constitution shall have been so amended as to make it what its framers intended; and so as to secure perpetual ascendency to the party of the Union; and so as to render our republican Government firm and stable forever. The first of those amendments is to change the basis of representation among the States from Federal numbers to actual voters...With the basis unchanged the 83 Southern members, with the Democrats that will in the best times be elected from the North, will always give a majority in Congress and in the Electoral college...I need not depict the ruin that would follow.

9. Thaddeus Stevens had mentioned amending the Constitution. Talk of amending the Constitution for the purpose of clarifying United States citizenship and securing the civil rights of Negroes began shortly after the war ended. The text of the proposed Fourteenth Amendment was as follows:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indiana not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

10. The next two documents explain why the framers of the Fourteenth Amendment thought it was necessary. On February 2, 1866, one of the authors of the amendment, John A. Bingham of Ohio, discussed its purpose:[8]

> ...[The statement that "all persons are entitled to life, liberty, and the pursuit of happiness"] rests upon the authority of the whole people of the United States, speaking through their Constitution as it has come to us from the hands of the men who framed it. The words of that great instrument are:
>
> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."
>
> "No person shall be deprived of life, liberty, or property, without due process of law."
>
> What do gentlemen say to these provisions? "Oh, we favor that; we agree with the President that the basis of the American system is the right of every man to life, liberty, and thepursuit of happiness; we agree that the Constitution declares the right of every citizen of the United States to the enjoyment of all privileges and immunities of citizens in the several States, and of all persons to be protected in life, liberty, and property."
>
> Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the

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[8] Congressional Globe, 39th Cong., 1st Sess., 1089-1090.

privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States!...

What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States...

The gentleman seemed to think that all persons could have remedies for all violations of their rights of "life, liberty, and property" in the Federal courts.

I ventured to ask him yesterday when any action of that sort was ever maintained in any of the Federal courts of the United States to redress the great wrong which has been practiced, and which is being practiced now in more States than one of the Union under the authority of State laws, denying to citizens therein equal protection or any protection in the rights of life, liberty, and property....

A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.

Mr. Speaker, on this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of Barron vs. The Mayor and City Council of Baltimore, involving the question whether the provisions of the fifth article of the amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts...[The Court decided that the states were not bound by the Bill of Rights.]

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men. Why should it not be so? That is the question. Why should it not be so? Is the bill of rights

> to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced...
>
> I commend...to the honorable gentleman from New York [Mr. Hale] the paper issued by his distinguished fellow-citizen, when he was acting as Secretary of State for the United States, the lamented Marcy, touching the protection of the rights of Martin Koszta, a citizen of the United States, whose rights were invaded abroad, within the jurisdiction of the empire of Austria. Commodore Ingraham gave notice that he would fire upon their town and their shipping unless they respected the rights of a declared citizen of the American Republic. You had the power to enforce your demand. But you are powerless in time of peace, in the presence of the laws of South Carolina, Alabama, and Mississippi, as States admitted and restored to the Union, to enforce the rights of citizens of the United States within their limits.
>
> Do gentlemen entertain for a moment the thought that the enforcement of these provisions of the Constitution was not to be considered essential? Consider the triple safeguards interposed in the Constitution itself against their denial. It is provided in the Constitution, in the first place, that "this Constitution," the whole of it, not a part of it, "shall be the supreme law of the land." Supreme from the Penobscot in the farthest east, to the remotest west where rolls the Oregon; supreme over every hamlet, every State, and every Territory of the Union.
>
> As the whole Constitution was to be the supreme law in every State, it therefore results that the citizens of each State, being citizens of the United States, should be entitled to all the privileges and immunities of citizens of the United States in every State, and all persons now that slavery has forever perished, should be entitled to equal protection in the rights of life, liberty, and property....
>
> "Let it be remembered that the rights for which America has contended were the rights of human nature...."
>
> As slaves were not protected by the Constitution, there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves and refusing them protection in life or proterty....
>
> But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights....

11. Later that spring, on May 8, 1866, Thaddeus Stevens discussed the relationship of the proposed amendment to the Civil Rights Bill[9]

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[9] *Ibid.*, 2459.

> Let us now refer to the provisions of the proposed amendment.
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> The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws.
>
> I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all....
>
> Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. The veto of the President and their votes on the bill are conclusive evidence of that....This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get. And yet certain of our distinguished friends propose to admit State after State before this becomes a part of the Constitution. What madness! Is their judgment misled by their kindness?...

12. In June, 1866, the Fourteenth Amendment was submitted for ratification to the various states, including those Southern states still unrepresented in Congress. The following response by a Committee of the Arkansas legislature is representative of the reaction in all the seceded states except Tennessee:[10]

> 1. It is not known, nor can it be, to the State of Arkansas, that the proposed amendment was ever acted upon by a Congress of such a character as is provided for by the Constitution, inasmuch as nearly one-third of the States were refused representation in the Congress which acted upon this amendment....
>
> 3. The great and enormous power sought to be conferred on Congress by the amendment, by giving to that body authority to enforce by appropriate legislation the provisions of the first article of said amendment, would, in effect, take from the States all control over their local and domestic concerns, and virtually abolish the States.

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[10] Walter L. Fleming, Documentary History, I, 236-237.

> 4. The second section seems, to the committee, an effort to force negro suffrage upon the States; and whether intended or not, it leaves the power to bring this about, whether the States consent or not; and the committee are of the opinion that every State Legislature should shrink from ever permitting the possibility of such a calamity.
>
> 5. The third section, as an act of disfranchisement which would embrace many of our best and wisest citizens, must, of necessity, be rejected by the people of Arkansas.

13. When the legislatures of the southern and border states refused to ratify the Fourteenth Amendment failed to be ratified, Congress decided that different measures were in order. Consequently, several "reconstruction" acts were passed. The gist of "Congressional Reconstruction" can be found in the first of the acts, the Reconstruction Act of March 2, 1867, which was passed over President Johnson's veto. A portion of that Act is printed below:[11]

> Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyalty and republican State governments can be legally established: Therefore
>
> Be it enacted,...That said rebel States shall be divided into military districts and made subject to the military authority of the United States, as hereinafter prescribed....
>
> Sec. 5...When the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in that State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion, or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors of delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution

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[11] Ibid., 401-402.

> shall have adopted the amendment to the Constitution of the United States, proposed by the thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking oaths prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State....

14. On the basis of the Reconstruction Act of 1867, the Southern states were finally readmitted to the Union, and their representatives were allowed to take their seats in Congress. The Congressional resolution on the readmission of Arkansas is typical of the resolutions concerning the readmission of all the seceded states:[12]

> Whereas the people of Arkansas, in pursuance of the provisions of an act entitled "An act for the more efficient government of the rebel States," passed March 2, 1867, and the acts supplementary thereto, have framed and adopted a constitution of State government, which is republican, and the legislature of said State has duly ratified the amendment to the Constitution of the United States proposed by the thirty-ninth Congress, and known as Article fourteen; Therefore,
>
> Be it enacted...That the State of Arkansas is entitled and admitted to representation in Congress, as one of the States of the Union, upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all inhabitants of said State.

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[12] Ibid., 476.

SECTION IV

". . . WITH LIBERTY AND JUSTICE FOR ALL"

As you know by now, it is one thing to write a constitution, and quite another to put it into practice. Sovereignty is as sovereignty does. The Fourteenth Amendment was the constitutional solution to the problem of national citizenship, but it was not self-activating. It had to be interpreted and enforced.

To see how it was interpreted--to see national sovereignty at work--is the purpose of this section. The following documents will give an indication of the thinking of Americans about national sovereignty in one area of American life, the area of civil rights.

As you study this section remember that it is just as important to know who is making a decision as it is to know what the decision is.

1. Morrison R. Waite, Chief Justice of the Supreme Court, wrote the following on the relationship of the citizen to the nation in a decision handed down in 1874:[1]

> There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons [called 'citizens'] for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is compensation for the other: allegiance for protection and protection for allegiance.

2. The reconstruction government of Louisiana had granted one company an exclusive license to operate slaughterhouses in the New Orleans area. As a consequence, hundreds of other slaughterhouse operators were deprived

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[1] Minor v. Happersett, 21 Wallace 162, 165-166.

of their livelihood. These operators took their case to court, arguing that Louisiana, contrary to the Fourteenth Amendment, was depriving them of their liberties and property without due process of law. The Supreme Court decided the cases in 1873. Four justices dissented from the majority opinion, but the logic of Mr. Justice Miller carried the day:[2]

> The plaintiffs . . . allege that the [Louisiana] statute is a violation of the Constitution of the United States in these several particulars:
>
> That it creates an involuntary servitude forbidden by the Thirteenth article of Amendment;
>
> That it abridges the privileges and immunities of citizens of the United States;
>
> That it denies to the plaintiffs the equal protection of the laws; and,
>
> That it deprives them of their property without due process of law; contrary to the provisions of the first section of the Fourteenth article of Amendment.
>
> This Court is thus called upon for the first time to give construction to these articles. . . .
>
> The first section of the Fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship--not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen,

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[2] Slaughterhouse Cases, 16 Wallace 36, 66-67, 72-75, 77-78 (1873).

were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. . . .

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section . . . speaks only of privileges and immunities of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the work citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

> Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.
>
> If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment. . . .
>
> It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states--such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exlusively to the states? . . .
>
> We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them. . . .

3. Justice Bradley dissented from the Court's opinion. Part of his reasoning follows:[3]

> The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence.

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[3] _Ibid._, 112-113, 116.

> The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as teh legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.
>
> Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what, in general, are the privileges and immunities of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them? . . .
>
> This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

4. The Slaughterhouse Cases notwithstanding, Congress passed a Civil Rights Act in 1875 declaring that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, . . . theaters, and other places of public amusement." The law was challenged, and when the cases reached the Supreme Court Justice Bradley, who dissented from the Court's decision in the Slaughterhouse Cases wrote the opinion for the majority:[4]

> [I]t is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those

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[4] Civil Rights Cases, 109 U.S. 3, 10-11,13-14, 26 (1883).

who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? . . .

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of live, liberty, or property without due process of law; not deny to any person within its jurisdiction the equal protection of the law."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. . . . It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. . . .

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. . . .

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be

> corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. . . . [Instead], it steps into the domain of local jurisprudence, and lays down other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities. . . .
>
> The answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void. . . .
>
> Mr. Justice Harlan dissenting. . . .

5. In 1896 the Supreme Court gave a new twist to the question of equal protection of the law under the Fourteenth Amendment. The important facts of the case are given in the opinion of the Court, which was delivered by Justice Brown:[5]

> This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. . . .
>
> The constitutionality of this act is attacked upon the ground that it conflicts both with the 13th Amendment of the Constitution, abolishing slavery, and the 14th Amendment which prohibits certain restrictive legislation on the part of the states.
>
> 1. That it does not conflict with the 13th Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. . . .
>
> So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures..

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[5] Plessy v. Ferguson, 163 U.S. 537, 540, 542, 550-552 (1896).

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument . . . assumes that social prejudice may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political right of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

6. Justice Harlan dissented from the Court's opinion in Plessy v. Ferguson:[6]

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed such legislation as that here in question is inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States. . . .
>
> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Consititution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race, a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all

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[6] Ibid., 554-555, 559-560, 562-564.

citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. . . .

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accomodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done. . . .

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the People of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each state of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their golemn duty to maintain the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.

> For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

7. Half a century after Plessy v. Ferguson, the Supreme Court handed down another crucial decision interpreting the Fourteenth Amendment in Brown v. Board of Education of Topeka. Chief Justice Warren spoke for a unanimous Court:[7]

> These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.
>
> In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. . . .
>
> The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. . . .
>
> Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty. . . .
>
> In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson. . . involving not education but transportation. American courts have since labored with the doctrine for over half a century. . . .

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[7] 347 U.S. 483, 486-495 (1954). (Citations omitted)

In the instant cases, that question is directly presented. . . . [T]here are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, . . . in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school. . . . Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [that segregation generates a feeling of inferiority] is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .

8. From the Civil Rights Act of 1964:[8]

TITLE II - INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any factility located on the premises of any retail establishment or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

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[8] _U.S. Statutes at Large_, LXXVIII, 243-244.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Se. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, inclucing an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the

> complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

9. It did not take long for the constitutionality of the Civil Rights Act to be challenged. The proprietor of a motel in Atlanta, Georgia, refused to rent rooms to Negroes. Despite the passage of the Civil Rights Act, the proprietor refused to comply with its provisions, claiming that Title II of the act was, among other things, an unconstitutional extension of the power of Congress to regulate commerce. The Supreme Court decided the case on December 14, 1964, Justice Clark delivering the majority opinion:[9]

> It is admitted that the operation of the motel brings it within the provisions of Sec. 201 (a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.
>
> The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on Sec. 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, Sec. 8, cl. 3, of the Constitution.
>
> The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is Sec. 201 (d) or Sec. 202, having to do with state action, involved here and we do not pass upon either of those sections.
>
> We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate

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[9] Atlanta Motel v. United States, 379 U.S. 241, 249-250 (1964). (Citations omitted.)

travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. . . . The Constitution requires no more.

10. In a concurring opinion in this case, Justice William O. Douglas pointed out what he believed to be a serious defect in the decision:[10]

> Though I join the Court's opinions, I am somewhat reluctant. . . to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interest of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race,. . . "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.". . .
>
> Hence I would prefer to rest on the assertion of legislative power contained in Sec. 5 of the Fourteenth Amendment which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"-- a power which the Court conceded was exercised at least in part in this Act.
>
> A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construciton would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.
>
> My opinion last Term in Bell v. Maryland makes clear my positon that the right to be free of discriminatory treatment (based on race) or interstate -- is a right guaranteed against state action by the Fourteenth Amendment. . . .
>
> I think the Court is correct in concluding that the Act is not founded on the Commerce Class to the exclusion of the Enforcement Clause of the Fourteenth Amendment. . . .
>
> The "means" used in the present Act are in my view "appropriate" and "plainly adapted" to the end of enforcing Fourteenth Amendment rights as well as protecting interstate commerce. . . .
>
> "State action" -- the key to Fourteenth Amendment guarantees -- is defined by Sec. 201 (d) [of the Civil Rights Act] as follows:
>
> Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discimination or

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[10] Ibid., 297-283, 286. (Citations omitted.)

> segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or *enforced by officials of the State* or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof. (Italics added.)
>
> Section 202 declares the right of all persons to be free from certain kinds of state action at *any* public establishment -- not just at the previously enumerated places of public accommodation. . . .
>
> Thus the essence of many of the guarantees embodied in the Act are those contained in the Fourteenth Amendment. . . .

11. In 1961 the Supreme Court reversed the convictions of several Negroes who had been arrested for disturbing the peace when they refused to leave lunch counters in Louisiana drug stores. In concurring with the Court's opinion, Justice Douglas suggested some legal possibilities for the future while explaining what he believed to be the meaning of "public establishment" under the Fourteenth Amendment.[11]

> It is my view that a state may not constitutionally enforce a policy of segregation in restaurant facilities. Some of the arguments assumed that restaurants are "private" property in the sense that one's home is "private" property. They are, of course, "private" property for many purposes of the Constitution. Yet so are street railways, power plants, warehouses, and other types of enterprises which have long been held to be affected with a public interest. Where constitutional rights are involved, the proprietary interests of individuals must give way. . . .
>
> A business may have a "public interest" even though it is not a "public utility" in the accepted sense. . . .
>
> Under Louisiana law, restaurants are a form of private property affected with a public interest. . . . The city of Baton Rouge in its City Code [regulates restaurants by requiring] all restaurants to have a permit. . . .
>
> [T]here can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license

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[11] *Garner et al.* v. *Louisiana*, 368 U.S. 157, 181-185 (1961). (Citations omitted.)

a business for public use is derived from the public. Negroes are as much a part of that public as are whites. A public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public. I see no way whereby licenses issued by a State to serve the public can be distinguished from leases of public facilities for that end.

One can close the doors of his home to anyone he desires. But one who operates an enterprise under a license from the government enjoys a privilege that derives from the people. . . . The necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group. As the first Mr. Justice Harlan stated in dissent in Plessy v. Ferguson, . . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind. . . .

SECTION V

THE CITIZEN AND THE NATION IN THE TWENTIETH CENTURY

Section V presents recent statements by prominent Americans regarding the merits of national government in modern America. Each of the statements contains important implications about the nature of sovereignty and about the effectiveness of national sovereignty in the twentieth century. Careful study of the documents will be helpful in examining the historical significance of the American pledge of allegiance.

1. In 1960 a political scientist had this to say about the American nation and government:[1]

> [Harry Jaffa argues that modern developments have made the United States a nation in fact and that in all national affairs, education now being one area, it must act as a nation.]

2. Senator Barry Goldwater on some problems of a federal system of government:[2]

> [Barry Goldwater contends that in the field of racial relations there are some rights clearly protected by valid laws and are, therefore, civil rights, among them the right to vote. Since there is no constitutional provision for national action in the field of education, it remains to this day a local affair under the jurisdiction of the states.]

3. Justice William O. Douglas on national citizenship and the Fourteenth Amendment:[3]

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[1] Harry V. Jaffa, "The Case for a Stronger National Government," Robert A. Goldwin ed., A Nation of States (Rand McNally and Company, Chicago, 1961), 106-108.

[2] Barry Goldwater, The Conscience of a Conservative (Hillman Books, New YOrk, 1960), 34-38.

[3] Bell v. Maryland, 378 U.S. 226, 243-245, 247, 260 (1964). (Footnotes omitted.)

The whole Nation has to face the [constitutional] issue; Congress is conscientiously considering it; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. . . .

The clash between Negro customers and white restaurant owners is clear; each group claims protection by the Constitution and tenders the Fourteenth Amendment as justification for its action. . . .

We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justifiable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the courts. When we default, as we do today, the prestige of law in the life of the Nation is weakened. . . .

We deal here with public accommodations -- with the right of people to eat and travel as they like and to use facilities whose only claim to existence is serving the public. . . .

Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is denial of a privilege and immunity of national citizenship. . . .

4. Elijah Muhammad on Negro citizenship, June 21, 1963:[4]

[Elijah Muhammad answers that the American nation is incapable of giving justice to the black man and pleads consequently for a separate black nation. He holds that forced integration, which will be successful after considerable bloodshed - largely Negro blood, holds no future for the 20,000,000 Blacks in America.]

5. In an essay written in 1961 a newspaper editor expressed hisoopinion on the same subject:[5]

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[4] Roy L. Hill, ed., Rhetoric of Racial Revolt (Golden Bell Press, Denver, Colorado, 1964), 292-293.

[5] James J. Kilpatrick, "The Case for 'States' Rights'," in Ibid., 100-105.

> [James J. Kilpatrick warns that the liberties of Americans are being endangered by the trend toward stronger national government. Not only are the states and their consituent localities able to experiment in a thousand areas of human conduct - a process of political ferment absolutely essential to the continued strength of the Republic, but the states and localities are closer to the people than is the federal government and can thus be controlled in ways in which central government can never be.]

6. From 1945 to 1947 a group of eleven men worked to frame a new constitution. Part of a preliminary draft appears below:[6]

> [Robert M. Hutchins agrees that liberty and justice are endangered by strong national government but suggests that they might best be preserved by replacing the sovereignty of the nation with the sovereignty of a world government.]

7. From the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

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[6] Robert M. Hutchins, et al., Preliminary Draft of a World Constitution (The University Of Chicago Press, Chicago, 1948), 3-6, 9-10.

SUGGESTIONS FOR FURTHER READING

A good set of essays on the general topic of American federalism can be found in the volume edited by Robert A. Goldwin entitled *A Nation of States* (Rand McNally, Chicago, 1961). On the historical origins of American federalism, *The Federalist* (of which there are many editions) is essential to any complete study and A. T. Mason's *The States Rights Debate* (Prentice-Hall, Englewood Cliffs, New Jersey, 1964) contains other significant documents on the framing and adoption of the Constitution.

For the student who is interested in political science, Calhoun's *Disquisition on Government* (many paperback editions) will add depth to his understanding of the pre-Civil War period. Also, John P. Roche's *The Early Development of United States Citizenship* (Cornell University Press, Ithaca, 1949) is a succinct discussion of the early constitutional ambiguity concerning citizenship.

On the framing and original purpose of the Fourteenth Amendment the best introduction is Joseph James' *The Framing of the Fourteenth Amendment* (University of Illinois Press, Urbana, 1965).

On the national government and civil rights I would suggest two works: Chapters three and four of an incisive little volume by John P. Roche, *Courts and Rights* (Random House, New York, 1961), and a recent collection of essays edited by Donald B. King and Charles W. Quick under the title *Legal Aspects of the Civil Rights Movement* (Wayne State University Press, Detroit, 1965).